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Supreme Court, U.S.
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No. 01-1732

In the
Supreme Court of the United States

BANK ONE, N.A.,
Petitioner,

v.

MYRA MAE SHUMAKE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Federal Arbitration Act, 9 U.S.C. § 4, bar a U.S. district court from ordering exhaustion of tribal remedies on the tribal law question whether there exist valid agreements to arbitrate claims pending against a bank in a tribal court arising from commercial contracts with tribal members solicited on reservation trust lands by the bank's door-to-door salesman?

2. Does a tribal court have jurisdiction in suits filed against a bank to decide the tribal law question whether there exist valid agreements to arbitrate disputes arising from commercial contracts with tribal members solicited on reservation trust lands by the bank's door-to-door salesman, to compel arbitration if such agreements are found, and, if not found, to adjudicate those disputes?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 281 F.3d 507. The opinion of the district court (Pet. App. 15a-35a) is reported at 144 F.Supp.2d 640.

JURISDICTION

The court of appeals issued its decision on Feb. 15, 2002. Bank One, N.A.'s ("Bank One's") timely petitions for rehearing and rehearing *en banc* were denied on Mar. 28, 2002. (Pet. App. 36a). No member of the panel nor any judge in regular active service on the court of appeals requested that the court be polled on the petition for rehearing *en banc*. (Pet. App. 37a). This Court's jurisdiction was invoked by Bank One pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Background and Proceedings in the Tribal Court and the District Court. The Mississippi Band of Choctaw Indians (the "Tribe") is a federally recognized Indian tribe located on Choctaw Indian Reservation trust lands in Mississippi (the "Reservation"). Respondents (all Choctaw Tribal members) filed suit against Petitioner ("Bank One") in the civil division of the Tribe's courts (the "Choctaw court"). Respondents seek rescission and damages based on certain home satellite system sales and financing contracts solicited by Bank One through a door-to-door salesman at Respondents' homes on the Reservation. Respondents allege that the sales and financing contracts were induced through the salesman's false and fraudulent representations. (Pet. App. 15a-16a). Those lawsuits are still pending. It is undisputed that there were no arbitration provisions in those original contracts. (Pet. 4-5).

Bank One claims it later sent a "mailer" to Respondents proposing to add an arbitration clause to the

financing contracts and giving Respondents a thirty day window to reject this change. (Pet. 4-5). Bank One has not proven the due receipt of any of these mailers, and there has been no judicial determination of whether this procedure was legally sufficient to give rise to an agreement to arbitrate valid under the Tribe's choice of law rules and contract law.

After these lawsuits were filed, Bank One filed suits to compel arbitration in the federal district court under § 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, claiming the parties had agreed to binding arbitration. The jurisdiction of the district court was based solely on 28 U.S.C. § 1332, Bank One being an Ohio Corporation and the Respondents being reservation residents, but citizens of Mississippi for diversity purposes. (Pet. App. 28a).

Bank One did not attack the Choctaw court's civil jurisdiction over Respondents suits, but did ask the district court to bar exercise of that jurisdiction. In response, Respondents filed a motion to dismiss for Bank One's failure to exhaust tribal remedies. In that motion and in response to Bank One's motion to compel arbitration, Respondents timely called to the attention of the district court that the validity of the alleged arbitration agreements was in dispute and that this was an issue controlled by Choctaw law. The district court dismissed Bank One's suits, ruling that exhaustion of tribal remedies was required "so that the parties may present their positions for consideration by the tribal court." (Pet. App. 16a).

The district court ordered exhaustion (a) because Respondents had made "the requisite colorable claim of tribal jurisdiction" necessary to invoke the tribal exhaustion doctrine "since the activities of which [Respondent] complains not only occurred on [reservation trust lands], but also involve the formation of [commercial contracts] between Bank

One and a member of the Tribe." (Pet. App. 21a-22a), and Bank One's federal lawsuits involved a challenge to exercise of the Choctaw court's jurisdiction; (b) because Bank One did not claim that any of the exceptions to tribal exhaustion under *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) were applicable (Pet. App. 24a); and (c) because the FAA is not the kind of statute which preempts the tribal exhaustion doctrine. (Pet. App. 26a-28a).

Bank One has always had the right to present its arbitration arguments to the Choctaw court, but has not done so. Respondents have acknowledged the Choctaw court's duty to compel arbitration if valid arbitration agreements are found to exist.

2. Proceedings in the Fifth Circuit. The court identified the controlling question on appeal to be "[d]oes the FAA have the pre-emptive force of the Price-Anderson Act thereby displacing comity considerations underlying the tribal exhaustion doctrine?" The court ruled that the FAA "does not reflect a congressional intent for federal courts to occupy the entire field of arbitration law", and does not reflect a Congressional preference that Bank One's arbitration claims should or must be resolved in a federal forum; hence, held the FAA does not have the preemptive force of the Price Anderson Act ("PAA"), 42 U.S.C. §§ 2014(hh) and 2201 *et seq.*, found in *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473 (1999) to excuse exhaustion of tribal remedies. Accordingly, exhaustion was required. (Pet. 8a-11a).

Bank One's statement (Pet. 1) that "[t]he Fifth Circuit nevertheless held that, when there is an action pending in Indian tribal court, a federal district court *may not* adjudicate a motion to compel arbitration under the FAA, even though a party has breached a "legally enforceable arbitration agreement" is an inaccurate characterization of the Fifth

Circuit's ruling. The question whether a valid written agreement to arbitrate exists in this case – a question of tribal law, not federal law – has not yet been answered. Thus, it is a gross inaccuracy to suggest that the Fifth Circuit's ruling required dismissal for failure to exhaust tribal remedies in the face of a § 4 motion to compel arbitration in a case where all parties have acknowledged (or it has already been judicially determined between the parties) that there exists an arbitration agreement valid under local law and "legally enforceable" under the FAA. It may well be that in such circumstances, exhaustion would "serve no purpose other than delay," and would not be required. *See, Strate v. A-1 Contractors*, 520 U.S. 454, 459-460, n.14 (1997); but, this case does not involve those circumstances.

Likewise, Bank One's assertions (Pet. 7-9, 20-21) that the Fifth Circuit ruling in this case is inconsistent with the Fifth Circuit's own arbitration rulings in other appeals upholding Bank One's "mailer" procedure and that those other rulings "resolve" the arbitration issues presented here, making "this case an ideal vehicle" for addressing the FAA issues raised in Bank One's first "Question", are clearly wrong. The question answered in those *unpublished* decisions – whether Bank One's mailer gave rise to a written agreement to arbitrate which was otherwise enforceable under the applicable local law (including the original contract's choice of law specification of Ohio law) – did not turn on federal law. Instead, that question is controlled by the non-federal contract law of the different jurisdictions into which Bank One's "mailer" was allegedly sent. Choctaw law had no bearing upon and was not applied in those cases and none of those unpublished decisions are precedent under the rules of the Fifth Circuit, hence did not judicially resolve anything. *See, infra,* part 2.C.

Further, neither lower court ruled upon the jurisdictional issue which underlies Bank One's second "Question" – whether the Choctaw court has jurisdiction to adjudicate Respondents' civil claims against Bank One. Instead, the Fifth Circuit merely affirmed the district court's decision that Respondents had made the "requisite colorable claim of tribal jurisdiction" required to invoke the tribal exhaustion doctrine. (Pet. App. 2a, 21a) This left for another day any final determination on whether the Choctaw court has civil jurisdiction over these suits against Bank One on the facts of this case under *Montana v. U.S.*, 450 U.S. 544 (1981) after a full record on this issue is developed in the Choctaw court (Pet. App. 34a-35a).

REASONS FOR DENYING THE WRIT

1. Introduction to Reasons for Denying the Writ.

The question whether Bank One's later "mailer" was sufficient to add an arbitration clause to the parties' contracts is the controlling issue in this case. The FAA leaves that contract issue to be decided by the non-federal contract law of the jurisdiction in which the arbitration agreement is claimed to have arisen. In this case, that jurisdiction is the Choctaw Indian Reservation and Choctaw law (including the Tribe's choice of law rules) supplies the rules of decision missing from the FAA. *See, infra,* parts 2.B. and C. Hence, Bank One's assertions (Pet. 19) that "there were no practical reasons for requiring tribal exhaustion" since this case only involves "federal law – the FAA – not tribal law" and that no "tribal court proceeding [was] needed to develop an evidentiary record", are completely at odds with the facts of this case and the law of arbitration under the FAA.

Seeking to evade its duty to exhaust tribal remedies, Bank One has throughout these proceedings sought to induce the courts to ignore the controlling tribal law questions – to

skip them – to jump directly to its asserted federal right to secure enforcement of what it claims to be binding written arbitration agreements. The Fifth Circuit decision properly protected the right of the Choctaw parties – derivative of the Mississippi Choctaws' "right to make their own laws and be ruled by them" under *Williams v. Lee*, 358 U.S. 217 (1959) – to secure an answer to these local law questions in the Choctaw court under Choctaw law before being forced to give up their right to a judicial determination of their disputes with Bank One.

On Bank One's first "Question," the Fifth Circuit's disposition of these FAA/tribal exhaustion issues is not in conflict with any decision of this Court or with any decision of any other federal circuit. *Every other federal circuit to address these issues has come out the same way. See, infra,* part 2.D. This is because federal statutes such as the FAA which merely offer the option of using a federal forum for resolving certain private disputes, but leave to the plaintiff the choice of pursuing those claims in a non-federal forum; or, to a defendant the option to have such a claim when filed in a non-federal forum resolved there, do not excuse compliance with the tribal exhaustion doctrine. It is only when the federal statute at issue either requires – or makes unmistakably clear that the Congress prefers (not merely permits) – resolution of those private disputes in a federal forum, that the duty to exhaust tribal remedies is waived. *Neztsosie*, 526 U.S. at 484, n.6 and 485, n.7. *See, infra,* parts 2.A. and B.

Nor does the Fifth Circuit's decision to leave the jurisdictional issues underlying Bank One's second "Question" for later determination after exhaustion of tribal remedies conflict with any decision of this Court or any other federal circuit. Bank One did not challenge on appeal the district court's ruling that none of the exceptions to tribal exhaustion established in *National Farmers* were applicable

(Pet. App. 24a); and, Bank One did not attack in the district court the underlying civil jurisdiction of the Choctaw court to adjudicate the pending tribal court cases and again disclaimed any such attack "in this appeal" in its reply brief before the Fifth Circuit. *See, infra,* parts 3.A. and B. Instead, Bank One's sole argument for evading exhaustion of tribal remedies was its claim that the FAA preempted the tribal exhaustion doctrine. (Pet. App. 21a-23a). That claim was properly rejected by the Fifth Circuit on the facts of this case. *See, infra*, parts 2.D and 3.D. and E.

Bank One's new argument that it did not know (and had no way to know) it was dealing with reservation Indians (Pet. 25) was not timely raised, first appearing in Bank One's petitions for rehearing in the Fifth Circuit long after oral argument. *See, Comsat Corp. v. FCC*, 250 F.3d 931, 936, n.5 (5th Cir. 2001) (arguments first made at oral argument are not timely raised and will not be considered), and was not ruled upon by either lower court. Had this argument been timely raised, there was ample evidence to refute it. *See, infra,* part 3.C.

Since the Choctaw courts have not been given an opportunity to rule upon any of these jurisdictional questions, since neither lower court ruled upon them and since – in the absence of any challenge to the tribal court's jurisdiction in the district court – the record on this issue is wholly undeveloped, this case is not a proper vehicle for addressing the jurisdictional issues Bank One has now sought to raise in its second "Question." *See, infra,* part 3.

2. The Fifth Circuit's Tribal Exhaustion/FAA Ruling Does Not Conflict With the Rulings of This Court or Any Other Federal Circuit.

A. The Fifth Circuit Correctly Adhered to the Exhaustion Rulings of this Court.

This Court in *El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. at 484, summarized the rationale underlying the tribal exhaustion doctrine as established in *National Farmers Union, supra,* and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) as follows:

> Exhaustion was appropriate in each of those cases because "Congress is committed to a policy of supporting tribal self-government. . .. [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."

In *Strate v. A-1 Contractors, Inc.*, 520 U.S. at 448-453, this Court also reaffirmed the basic exhaustion principles of *National Farmer's Union*[1] *and Iowa Mutual,* but clarified that the ultimate tribal jurisdiction questions are to be resolved under *Montana v. United States*, 450 U.S. 544 (1981), and ruled that exhaustion of tribal remedies is excused if the tribe has no jurisdiction over the underlying claim under *Montana*. *Strate, supra,* at 453-460[2].

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[1] This Court in *National Farmers Union, supra,* at 856, n.21, identified three exceptions to the tribal exhaustion requirement. The district court noted these exceptions but, found that "Bank One had not contended that any of the three *National Farmers* exceptions apply. . . ." (Pet. App. 23a). Bank One did not challenge that ruling on appeal.

[2] *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), later applied the *Strate* exception to invalidate the tribe's attempt to tax the non-member for its conduct on its own fee lands, an action foreclosed by *Montana's* Main Rule, and the inapplicability of either *Montana* exception. The court again emphasized that the tax could have been upheld had it been levied upon the non-Indian company for its conduct on tribally-owned reservation lands, *Id.* at

This Court in *Neztsosie* distinguished for exhaustion purposes between cases filed in tribal courts which involve ordinary questions of federal law (as to which exhaustion of tribal remedies is not excused unless it is clear the tribe otherwise lacks jurisdiction over the action under *Montana* or where one of the other *National Farmers* exceptions to exhaustion is invoked), versus cases filed in tribal courts involving claims which fall within the exclusive jurisdiction of the federal courts based upon a completely preemptive statute,[3] or a statute which otherwise evidences the kind of "*unmistakable*" *Congressional preference* that the dispute should be resolved in a federal forum as was found by this Court in the Price Anderson Act ("PAA"), 42 U.S.C. §§ 2014(hh) and 2201 *et seq.*; *Neztsosie, supra,* at 484, n.6 and 485, n.7:

> 6. This structure [of the PAA], in which a public liability action becomes a federal action, but one decided under substantive state law rules of decision that do not conflict with the Price-Anderson Act, *see* 42 U.S.C. § 2014(hh), resembles what we have spoken of as "'complete pre-emption' doctrine," *see Caterpillar Inc. v.* Williams, 482 U.S. 386,

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651-654, or pursuant to a "consensual relationship evidenced by "commercial dealing, contracts, leases or other arrangements". *Id.* at 655-656.

[3] In this regard, *see,* Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty,* 50 Am. U.L. Rev. 1177, 1241 (2001) (in *Neztsosie* "Justice Souter was careful to point out, however, that only in cases involving complete preemption such as those brought under the [PAA], can defendants correctly assert that they need not exhaust their tribal remedies").

393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987), under which "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'". (Citations omitted).

* * * *

7. This is not to say that the existence of a federal preemption defense in the more usual sense would affect the logic of tribal exhaustion. Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (tribal courts available to vindicate federal rights). The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

In *Neztsosie*, this Court ruled that the PAA evidences an unmistakable Congressional preference that a federal forum decide public liability actions derivative of "nuclear incidents" in several ways. Initially, 42 U.S.C. §§ 2014(hh) and 2210(n)(2) federalize all such tort claims and authorize the promulgation of special rules by which the federal courts are to handle those claims (§ 2210(n)(3)(C)(v)), giving rise to a complete preemption of the field as to all such claims. *Neztsosie, supra,* at 484-485 and 484, n.6; *see, Acuna v.*

Brown & Root, Inc., 200 F.3d 335 (5th Cir. 2000) (the PAA creates "an exclusive federal cause of action for torts arising out of nuclear incidents."

Moreover, § 2210(n)(2) (Resp. App. 1a) contains a unique removal provision which *inter alia* gives the Atomic Energy Commission (now known as the Nuclear Regulatory Commission) and the Secretary of Energy (or either of them), and any defendant, the right to remove or transfer any such "public liability" action pending in any state court, or in any other U.S. district court, "to the U.S. District Court having venue" over such actions as otherwise provided at § 2210(n)(2). By this extraordinary provision, allowing either the Commission or the Secretary to force removal of the action (though not parties to the suit), Congress took this choice-of-forum decision from the parties and made unmistakably clear its preference that these cases be decided in the federal forum designated in the PAA.

Bank One asks this Court to summarily reverse or GVR this case because the Fifth Circuit described *Neztsosie* as "the most recent Supreme Court case" to address the tribal exhaustion doctrine. (Pet. 7, 12) and did not cite *Nevada v. Hicks*, 121 S.Ct. 2304 (2001). Bank One's criticism is unfounded. *Nevada v. Hicks, supra,* at 2315 did briefly allude to the tribal exhaustion doctrine and applied the same exception to exhaustion recognized in *Strate v. A-1 Contractors, supra* – excusing exhaustion where the court found that there was no tribal jurisdiction over the underlying action. Exhaustion was excused in *Hicks* because of the ruling that tribes do not possess any jurisdiction over state officials as regards their official conduct, nor (derivatively) any jurisdiction to adjudicate 42 U.S.C. § 1983 claims against such officials. *Hicks, supra,* at 2313. On that basis, the Court held that "adherence to the tribal exhaustion requirement in

such cases 'would serve no purpose other than delay,' and is therefore unnecessary." *Hicks, supra*, at 2315.[4]

However, the special circumstance which triggered this exception to exhaustion in *Hicks* does not apply here since no conduct of state officers is involved. *Nevada v. Hicks, supra,* at 2309, n.2 ("Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law."). This distinction, and Bank One's tortured attempt to shoehorn the FAA into the PAA template marked out in *Neztsosie* makes clear that the Fifth Circuit did not err in observing (Pet. App. 7a) that *Neztsosie* was "the most recent" tribal exhaustion decision of this Court germane to this case.

B. The FAA Does Not Reflect An "Unmistakable" Congressional Preference That a Federal Forum Resolve Arbitration Issues, Nor Is It Otherwise Completely Preemptive.

Unlike the PAA, the FAA does not confer exclusive or even concurrent jurisdiction upon the federal courts, *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S.1, 25, n.32 (1983), allows the parties to contractually circumvent many of its provisions, *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478-479 (1989), and does not require (or reflect any

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[4] To the extent this Court's ruling in *Nevada v. Hicks* that tribal courts do not have jurisdiction to adjudicate claims under 42 U.S.C. 1983 is viewed to be an "exhaustion" rather than a "jurisdictional" ruling, it simply mirrors the special concern otherwise evidenced in *Hicks* that tribal courts not encroach upon the official prerogatives of state officers by subjecting them to 1983 litigation in tribal courts, something this Court ruled the Congress never intended. *Hicks, supra,* at 2315.

Congressional preference) that a party's federal arbitration claims ever be presented to a federal forum. Instead, this choice-of-forum decision is wholly left to the parties under the FAA. The FAA merely creates a federal arbitration enforcement remedy available only if some other basis for federal jurisdiction exists. Indeed, as this Court has recognized the FAA is an "anomaly" and "enforcement of the [FAA] is left in large part to the state courts. . .." *Moses H. Cone, supra,* at 25, n.32; *see, C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 121 S.Ct. 1539 (2001) (affirming Oklahoma court's arbitration ruling re contract dispute with Indian tribe).

Moreover, the FAA neither expects nor requires uniformity in the answer to the question whether a valid arbitration agreement exists, instead leaving this to be determined by the non-federal contract law of the jurisdiction in which the dispute arose, including that jurisdiction's choice of law and unconscionability rules as applied to questions of "contract formation." 9 U.S.C. § 2 (". . .an agreement in writing to submit to arbitration. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (". . .generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (the question whether a valid agreement to arbitrate exists is governed by the non-federal law governing "the formation of contracts"); *see, EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 761-762 (2002) (FAA requires arbitration only when parties are bound to arbitrate by written agreement valid under applicable contract law); *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F.2d 375 (5th Cir. 1981) (seller's

attempt to add arbitration provision on back of printed invoice was a material alteration to the contract "to which no assent was given" hence was not valid under the "applicable state law" or enforceable under the FAA); *East Ford, Inc. v. Taylor*, 2002 WL 1584301 (Miss. S.Ct., July 18, 2002) (*en banc*) (arbitration clause held unconscionable, hence invalid and unenforceable under state law and the FAA); *Roberts v. Energy Development Corp.*, 235 F.3d 935, 939 (5th Cir. 2000) (contractual choice of law provision specifying Texas law was unenforceable since accident occurred in Louisiana and applying Texas law would contravene public policy of Louisiana as forum state).

In this regard, the Choctaw Reservation is a different law-making jurisdiction than the State of Mississippi or the State of Ohio. *Nevada v. Hicks*, 121 S.Ct. at 2511; *Williams v. Lee,* 358 U.S. at 220-223 (1959) (holding that absent governing acts of Congress, Indian tribes have "the right to make their own laws and be ruled by them" and to have that law applied to private commercial disputes between tribal members and non-members arising on their reservations); *see, United States v. John,* 437 U.S. 634 (1978) (holding that Choctaw Reservation was lawfully established and Tribe was lawfully recognized as an Indian tribe pursuant to federal law). Thus, in this case, the FAA leaves the underlying choice-of-law and contract issues implicated by this arbitration dispute to be supplied by the local law of the Tribe. *See, Hilti, Inc. v. Oldach*, 392 F.2d 368 (1st Cir. 1968) (applying Puerto Rico choice-of-law rules to determine validity of arbitration clause specifying Connecticut law in action to compel arbitration under FAA); *see also, Res. 2d, Conflicts*, §§ 186, 187 (ALI 1971) (contract choice of law clause does not incorporate choice of law rules of state law chosen, and such clause is not otherwise controlling if it offends public policy of the most interested jurisdiction).

The FAA does reflect a strong federal policy favoring arbitration and has given rise to federal law standards for deciding what issues are arbitrable once a valid arbitration clause is found to exist. *Moses H. Cone, supra*, at 24-25. However, those standards do not come into play until after a valid arbitration agreement is found. *See, EEOC v. Waffle House, Inc., supra,* at 761-762; *Badie v. Bank of America,* 79 Cal. Rptr.2d 273, 280 (Cal. App. 1998) (Bank's attempt to add an arbitration clause by a "mailer" with right to opt out did not create a valid arbitration agreement because Bank's customers had not actually agreed to arbitrate).

Bank One's preemption argument fundamentally rests upon the simple, but spurious, tautology that since Congress authorized Bank One to use "any United States District Court" to resolve its arbitration claims where diversity or federal question jurisdiction exists, the federal courts must set aside the tribal exhaustion requirement and decide those claims. (Pet. 12).

Petitioner's argument overlooks a critical aspect of the tribal exhaustion doctrine – it never applies unless there is already present some basis for the exercise of federal jurisdiction in a "U.S. District Court" to decide the claim presented. This circumstance can always be said to reflect a prior determination of the Congress that a federal forum must be made available *at the election of a plaintiff* for adjudication of *all such claims* by direct filing under § 1331 or § 1332, or at the *election of a defendant* by removal from a state court under § 1441, and that the district court has a clear statutory duty to decide those claims. *Colorado River Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976) (recognizing "virtually unflagging obligation of the federal courts to

exercise the jurisdiction given them" by Congress through enactment of jurisdictional statutes)[5].

But *Neztsosie* makes clear that federal statutes which merely confer this kind of option upon a party to choose whether to present a certain claim to a federal or to a non-federal forum do not preempt the duty to exhaust tribal remedies, *El Paso Natural Gas Company vs. Neztsosie, supra,* at 485, n.7. Exhaustion is excused only where the federal statute involved is completely preemptive, as noted in *Neztsosie, supra,* at 484, n.6; or otherwise evidences the kind of unmistakable Congressional preference that all such claims be resolved in a federal forum as in the PAA. *See, TTEA Corp. v. Ysleta del Sur Pueblo*, 181 F.3d 676 (5th Cir. 1999) (25 U.S.C. § 81 did not excuse exhaustion of tribal remedies nor divest tribe of jurisdiction of case involving § 81 claim and commercial contracts between Tribe and private parties arising on-reservation since § 81 is not completely preemptive).

Instead, the FAA invites parties to alleged arbitration agreements to choose whether to have a federal or nonfederal forum decide whether a valid arbitration agreement exists, but does not require (or evidence any kind of Congressional

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[5] Of course, this broad brush statement is not literally true. Parties in these circumstances are often deprived of a federal forum in such cases where one of this Courts' other "abstention" doctrines are invoked to leave a case in state court. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

preference) that a party must choose a federal forum to answer that question. Thus, § 4 of the FAA does not impose any greater duty upon the district courts to decide disputes as to the validity or enforceability of alleged arbitration agreements, than their duty to decide similar issues arising under other not-completely-preemptive federal statutes or when similar contract issues are confronted in diversity cases; and, yet, it is in precisely such circumstances that the tribal exhaustion doctrine requires that the federal action be stayed or dismissed where necessary to avoid interference with a tribal court's jurisdiction. Thus, the Fifth Circuit properly ruled that the FAA did not preempt the tribal exhaustion doctrine in this case[6]. To like effect, see the decisions of other federal circuits coming to the same conclusion set out *infra,* part 2.D.

C. The Other Unpublished Fifth Circuit Decisions Approving Bank One's "Mailer" Procedure Were Not Rulings of Federal Law or of Choctaw Law and Are Not Precedent.

As shown in *supra* part 2.B., the critical predicate arbitration question affirmatively answered in the several

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[6] As previously noted, Respondents did timely call to the attention of the district court that the validity of the alleged arbitration agreement was in dispute and that that dispute had to be decided under Choctaw law. Instead of ruling on those issues, the district court correctly dismissed for exhaustion of tribal remedies. If it were ultimately found that the district court was the proper forum for resolving these issues of tribal law, Respondents would be entitled to have a hearing before the district court on those tribal law issues and only if Bank One prevailed on them could an order compelling arbitration be entered.

unpublished opinions from the Fifth Circuit cited by Bank One (Pet. 7-9, 20-21) – whether Bank One's mailer gave rise to a written agreement to arbitrate which was otherwise valid under the applicable local law, including the original contracts' choice of law specification of Ohio law – did not turn on federal law; and, since those cases did not arise on the Choctaw Indian Reservation, also did not involve Choctaw law.[7] Moreover, these unpublished Fifth Circuit decisions "are not precedent" under Fifth Circuit Rule 47.5.4 (Rep. App. 2a), hence determine nothing as to Respondents' disputes with Bank One. *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357, 359, n.3 (5th Cir. 2002). Affirming those decisions is not inconsistent with letting the Choctaw court rule in Respondents' suits on the tribal law question whether there exists a valid arbitration agreement applicable to these contracts.[8]

The later bankruptcy court decision in *Bank One, N.A. v. Chickaway* (*In re Chickaway*)[9], No. 97-10630 EEG (Bankr.

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[7] *Bank One, N.A. v Lake*, 2002 U.S. App. Lexis 7793 (5th Cir. Apr. 5, 2002) (unpublished); *Bank One, N.A. v. Coates*, 125 F.Supp.2d 819 (S.D. Miss. 2001, aff'd without op., 2002 U.S. App. Lexis 7759 (5th Cir. Apr. 5, 2002).

[8] Due Process would not in any event permit the rulings in these decisions – on these mixed questions of fact and law – to be binding on Respondents who were not parties to those actions even if those decisions had been published. *Provident Tradesmans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968). ("It is a basic principle that a court's judgment will bind only those who are parties to the suit.").

[9] The *Chickaway* case also arose on the Choctaw Reservation and also began as a Choctaw member suit against Bank One in the Choctaw court. The *Chickaway* case was, however, removed to the district court and transferred to the federal bankruptcy court per 28 U.S.C. § 1452, a statute which authorizes removal of cases

S.D. Miss. Feb. 26, 2002), at p. 4, expressly disclaimed any independent analysis on these questions, simply adopting the decision in *Bank One, N.A. v. Coates, supra*, one of the off-reservation cases later affirmed by the Fifth Circuit. (Pet. 7-9, 20-21). *Id.* at p.4. ("The Court concludes that the remaining issues raised by *Chickaway* have been sufficiently dealt with by the District Court decision in *Bank One, N.A. v. Coates*. . .under very similar facts and that it is not necessary for this Court to make an additional analysis on these issues."). The bankruptcy court did not apply Choctaw law, simply borrowing the state law contract analysis applied in *Coates*; and, there has yet to be any evidentiary hearing or judicial determination whether the Choctaw Respondents actually received, noticed, read, understood or assented to the proposed contract changes, or whether Bank One's effort to add the arbitration clauses is otherwise valid under Choctaw law.

Finally, the Fifth Circuit's ruling in *Bank One, N.A. v. Boyd*, 288 F.3d 181 (5th Cir. 2002), reversed the district court's abstention from deciding Bank One's motion to compel arbitration in actions removed from state court, but noted that the parties opposing arbitration "have asserted a number of contract defenses to the arbitration provision" which could be addressed by the district court on remand under the applicable state law.

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involving core proceedings in bankruptcy "from any court". The Court ruled that § 1452 authorized removal from the Choctaw court and that tribal exhaustion was not required (for disputes constituting core proceedings in bankruptcy) because the "bankruptcy court has sole and exclusive jurisdiction" over such cases. *Chickaway v. Bank One Dayton, N.A.*, 261 B.R. 646 (S.D.Miss. 2001).

Thus, Bank One's assertions that this case is an "ideal vehicle" for addressing Bank One's arbitration arguments because it has already been judicially determined that Bank One's attempt to add an arbitration clause to Respondents' contracts gave rise to a valid and "legally enforceable" arbitration clause, are clearly erroneous. (Pet. 1, 7-8, 20-21).

D. The Fifth Circuit's Exhaustion/FAA Ruling is in Complete Accord With The Decisions Of Other Federal Circuits

Bank One has identified a number of cases from other federal circuits which it contends are in conflict with the Fifth Circuit's ruling. (Pet. 18-19). Two of those cases involved federal statutes which confer exclusive subject-matter jurisdiction upon the district courts to decide a particular class of cases. *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (tribal exhaustion not required as to suits filed under 42 U.S.C. § 6972(a) which "places exclusive jurisdiction in federal courts" over such suits); and, *Lower Brule Construction v. Sheesley's Plumbing*, 84 B.R. 638 (D.S.D. 1988) (exhaustion of tribal remedies is not required as to core proceedings in bankruptcy, since those claims fall within exclusive jurisdiction of bankruptcy court). *Accord, Chickaway v. Bank One Dayton, N.A.*, 261 B.R. 646 (S.D.Miss. 2001).

Bank One asserts (Pet. 18) that the Fifth Circuit's ruling is in conflict with these decisions because "[t]he only difference between the FAA and these statutes is the absence of a grant of subject-matter jurisdiction" but contends "that distinction does not make a material difference. *See Neztsosie*, 526 U.S. at 484-85, 487 n.7." Bank One's analysis is flawed. The critical distinction between the FAA and these other statutes is that the latter confer *exclusive* federal jurisdiction upon the district (or bankruptcy) courts, hence are completely

preemptive as to such claims, *Neztsosie, supra*, at 484, n.6, in contrast to the FAA and other federal statutes which simply give rise to "questions of federal law" which this Court in *Neztsosie, supra*, at 485, n.7 made clear would not displace the tribal exhaustion doctrine.

The other cases cited by Bank One excused exhaustion of tribal remedies because no tribal court cases were pending when the federal suits were filed, and because the cases did not involve any issues of "tribal law". *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 83-84 (2d Cir. 2001); *Altheimer & Gray v. Sioux Mtg. Corp.*, 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899, n.2 (9th Cir. 1991); *Myrick v. Devils Lake Sioux Mfg. Corp.*, 718 F.Supp. 753, 754-55 (D.N.D.1989). For both reasons – the absence of tribal law issues and tribal court proceedings in the other cases, and the presence of both factors here – the Fifth Circuit's ruling is not in conflict with those decisions. Indeed, that Choctaw law is controlling here is a strong argument for requiring exhaustion. *E.g., Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 06/08/1994); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 08/09/1996).

The Fifth Circuit's ruling that the FAA (or the alleged existence of an arbitration clause) does not excuse tribal exhaustion is the same answer given by every other federal circuit to address those issues. *Ninigret Development Co. v. Narrangansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 30-35 (1st Cir. 2000) (arbitration clause did not excuse exhaustion of tribal remedies); *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 64-69 (2nd Cir. 1997) (affirming District Court's denial of motion to compel arbitration and order that plaintiff exhaust tribal remedies); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412,

1415, 1421-1422 (8th Cir. 1996) (affirming District Court's order requiring exhaustion of tribal remedies despite arbitration clause and contract language agreeing that arbitration process "is deemed sufficient to exhaust the parties' tribal remedies"); *Stock West, Inc. v. Confed. Tribes of the Colville Reservation,* 873 F.2d 1221, 1224, 1227-1230 (9th Cir. 1989) (affirming District Court's dismissal of motion to compel arbitration under FAA and order requiring exhaustion of tribal remedies); *Calumet Gaming Corporation v. The Kickapoo Tribe of Kansas*, 987 F.Supp. 1321, 1328 (D. Kan. 1997) (FAA does not limit tribal court civil jurisdiction to enforce arbitration clause); *see, Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida,* 999 F.2d 503, 508 (11th Cir. 1993) (noting that when federal court action was stayed for exhaustion of tribal remedies after district court denial of motion to compel arbitration, the tribal court found a binding arbitration agreement and ordered parties to arbitrate); *cf. Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 1909 (2002), an arbitration dispute which came to the Eighth Circuit only after exhaustion of tribal remedies was ordered by the district court. *See*, Civil Docket, No. 96-Cv-202, entry of 4/02/02 ("this action is stayed pending plf's exhaustion of tribal court remedies")

E. The Fifth Circuit's Tribal Exhaustion Ruling does not Improperly Elevate Tribal Sovereignty Over State Sovereignty.

Bank One's argument that the Fifth Circuit's exhaustion ruling has the "anomalous effect of wrongly elevating tribal courts over state courts" (Pet. 14) is also in error. As shown *supra,* part 2.B., the tribal exhaustion doctrine is never invoked except in circumstances where the Congress has already given the plaintiff in a private dispute (or the defendant in such a case when choosing removal under

28 U.S.C. § 1441) the choice of avoiding state court jurisdiction. This is true both for cases filed under 28 U.S.C. §§ 1331 or 1332.

In these circumstances, the states' interests have already been wholly subordinated as regards the private parties' choice of forum. This is even more so where as here jurisdiction is founded on diversity under § 1332. In such cases the only federal interest is to help the plaintiff (or defendant) avoid a state forum. *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945). Thus, adherence to the tribal exhaustion doctrine in such cases is no affront to state sovereignty.

More fundamentally, the tribal exhaustion doctrine is about coordinating the exercise of federal and tribal jurisdiction in cases arising on Indian reservations and colorably falling within tribal jurisdiction, *Strate v. A-1 Contractors,* 520 U.S. at 446-454 (1997), and builds upon considerations of comity unique to the special relationship of the United States to the Indian Tribes. *Id.; National Farmers Union, supra; Iowa Mutual, supra*. Obviously, quite different comity and federalism concerns animate the several abstention doctrines governing the coordination of federal court and state court jurisdiction, *see, supra*, at n.3, and this Court has made clear its recognition that state sovereignty and tribal sovereignty markedly differ in both their origin and their attributes. *Nevada v. Hicks, supra*, at 2312-2313. It is, therefore, quite misleading to single out one strand of the many differences in the status of states and tribes as manifesting an affront to state sovereignty.

That these differences may allow removal of a case from a state court to federal court, under § 1441, when the same case would not be removable from a tribal court if it arose on reservation lands, is not caused by the tribal

exhaustion doctrine, but by the text of § 1441 (only authorizing removal from "state courts"). *Nevada v. Hicks*, 121 S.Ct. at 2315; *Martha Williams-Willis v. Carmel Financial Corp.*, 139 F.Supp.2d 773 (S.D. Miss. 2001) (tribal member satellite system lawsuits against finance company not removable from Choctaw courts under § 1441). Moreover, this situation has been obvious at least since *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 22 (Stevens, J., dissenting); and, can be easily cured by the Congress if this circumstance proves distasteful. Simply revising § 1441 to read more like the federal bankruptcy removal statute (28 U.S.C. § 1452, authorizing removal of such cases "from any court") would eliminate the difference of which Petitioner complains.

Further, Bank One does not represent any state interest here. It is simply a private party seeking to evade tribal court jurisdiction in a dispute arising on the Choctaw Reservation. Its espoused desire to protect state sovereignty rings hollow in the face of its Herculean efforts to avoid any state forum in its other satellite financing and arbitration disputes in the Fifth Circuit both by removal under § 1441 and invocation of diversity jurisdiction under § 1332. *Bank One, N.A., v. Lake, supra; Bank One, N.A. v. Boyd, supra, Bank One, N.A. v. Coates, supra.*

Finally, for the reasons set out in its opinion below (Pet. App. 11a-12a), the Fifth Circuit's rejection of Bank One's *Colorado River Water Conservation District* abstention argument was not in conflict with any decision of this Court or of any other federal circuit.

3. Neither Lower Court Ruled Upon Any Tribal Jurisdiction Issue and This Case is Not a Suitable Vehicle For Addressing Such Issues.

A. *Bank One did not Challenge the Choctaw Courts' Underlying Jurisdiction Before the U. S. District Court.*

This case is not a suitable vehicle for addressing whether Indian tribal courts have civil jurisdiction to decide disputes arising from commercial relationships between members and non-members of a tribe on their reservation lands as sought by Petitioner's second "Question," since neither lower court ruled on that question, and Bank One expressly disclaimed in the district court any attack upon the Tribe's underlying civil jurisdiction over the suits filed against Bank One in the Choctaw court. (Pet. App. 21a-22a).

B. *Bank One Further Disclaimed any Challenge to the Choctaw Courts' Jurisdiction before the Fifth Circuit.*

Rather than challenging the district court's ruling that Respondents had "advanced the requisite colorable claim of tribal jurisdiction" necessary for invocation of the tribal exhaustion doctrine, Bank One again disclaimed (Reply Br., p. 22, n.12) any attack "in this appeal" on the Choctaw court's underlying subject-matter jurisdiction over the suits filed there against Bank One:

> Tribal jurisdiction is not the issue in this appeal. Whether the tribal court has subject-matter jurisdiction to hear the cases is immaterial because the disputes are required to be arbitrated under the FAA. Therefore, while preserving its right to contest tribal jurisdiction at the appropriate time in the appropriate forum, Bank One will not address it further here.

Only later, after briefing, did Bank One allude in a Rule 28(j) letter to *dicta* in *Nevada v. Hicks, supra,* addressing the tribal civil jurisdiction issue.

C. Bank One's "We Didn't Know" Jurisdictional Argument Was Not Timely Raised and is Otherwise Unfounded

Bank One argues (Pet. 25-27) that it "had no notice that it would be haled into tribal court as a result of the transactions at issue" and asserts that it had no way to learn it was dealing with reservation Indians since "inquiry about an individual's race is prohibited by federal law. 15 U.S.C. § 1691, *et seq.*" Bank One did not timely raise this argument below, first alluding to the issue in its petitions for rehearing. The Fifth Circuit did not rule upon this argument. Had this argument been timely raised, Respondents would have had an opportunity to submit evidence showing that Bank One's salesman was a local resident of Mississippi intimately familiar with the Choctaw Indian Reservation and the tribal status of Respondents. It would not serve the interest of justice nor the interest of this Court to address this argument in these circumstances.

Moreover, Bank One's argument on this issue (Pet. 25-27) misstates the Fifth Circuit's ruling. Neither lower court ruled on the ultimate issue of tribal jurisdiction over the underlying civil claims against Bank One, but only upheld the district court's ruling that Respondents had made the requisite showing to require exhaustion of tribal remedies. (Pet. App. 6a and n.3). *See, Strate v. A-1 Contractors, Inc.,* 520 U.S. 438, 448-454 (1997), where this Court made clear that *Iowa Mutual's* recognition of a presumption of tribal jurisdiction sufficient to trigger tribal exhaustion was not a final ruling on whether the tribe had that jurisdiction. The district court also noted that the ultimate question whether the Choctaw courts

could exercise civil jurisdiction over Bank One will be subject to further federal review after the Choctaw courts have ruled upon that issue. (Pet. App. 32a).

Further, that ruling was not (as Bank One suggests) based on "the mere fact that a non-member of the Tribe has allegedly entered into a commercial relationship with a tribal member," (Pet. 25), but because Bank One's contracts with Respondents were solicited by its salesman in the Tribe's jurisdiction on Choctaw Reservation trust lands. (Pet. App. 21a).

Finally, while Respondents' membership in the Tribe is to some extend based upon their Native American ancestry, *U.S. v. John,* 437 U.S. at 646-647, their legal status as tribal members is a "political" status not a "racial" designation. *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974); and, nothing in 15 U.S.C. § 1691 *et seq.* forecloses inquiry into a credit applicant's tribal membership or whether their residence is located on an Indian Reservation, as argued by Petitioner (Pet. 25).

The regulations implementing § 1691, 12 C.F.R., part 202 – Equal Credit Opportunity (Regulation B), at Sec. 202.5(b) and (d)(5), expressly authorize a lender to inquire "about an applicant's permanent residence," and nothing in § 1691 or Regulation B forbids a lender's inquiry to discern in what jurisdiction its prospective customer resides. Indeed, Bank One was otherwise required to make inquiry whether its salesman would be peddling the subject satellite system/financing package to reservation Indians and to obtain the required Indian trader's permit to avoid running afoul of federal statutes prohibiting the very kind of sales to reservation Indians as occurred here. *See,* 25 U.S.C. §§ 260-264 *et seq.* (the Federal Indian Trader's Statutes) and 25 C.F.R., Part 140, *construed in Central Machinery Co. v.*

Arizona State Tax Commission, 448 U.S. 160, 165 (1980), where this Court held that "one of the fundamental purposes of [the Indian Trader's] Statutes and regulations [is] to protect reservation Indians from becoming victims of fraud in dealing with persons selling goods," and applies even where the seller does not have "a permanent place of business" on the Reservation.

D. *The Fifth Circuit's Ruling is Not in Conflict With Any of the Other Federal Circuit Decisions Cited by Bank One.*

The Fifth Circuit's ruling does not conflict with any of the other federal circuit decisions cited by Bank One (Pet. 24), all of which are obviously distinguishable. *Boxx v. Warrior*, 265 F.3d 771 (9th Cir. 2001), *cert. denied*, 202 U.S. Lexis 3056 (U.S. Apr. 29, 2002) (tribal court did not have civil jurisdiction to adjudicate tort claims filed by tribal members against non-Indians occurring on a federal road right-of-way as to which the Tribe had not expressly reserved its jurisdiction and where neither exception to *Montana's* Main Rule was invoked); *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 260 F.3d 971 (8th Cir. 2001) (limited the kind of contracts to which 25 U.S.C. § 81 applies in a case in which the United States was a party without ruling on any issue of tribal civil jurisdiction or the tribal exhaustion doctrine); *Hornell Brewing Company v. Seth Big Crow*, 133 F.3d 1087 (8th Cir. 1998) (tribal court lacked jurisdiction over tort claims filed against a non-Indian brewery for use of "Crazy Horse" name on an alcoholic beverage where the brewery's offending conduct all occurred off-Reservation); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (tribal court lacked jurisdiction over a tort suit by a tribal member arising from a traffic accident with a non-Indian on a U.S. highway within an Indian reservation where neither *Montana* exception applied).

E. Nothing in Nevada v. Hicks Altered the Tribal Court Civil Jurisdictional Rules Applicable in the Circumstances of this Case

This Court expressly limited its jurisdictional rulings in *Nevada v. Hicks*, 121 S.Ct. 2304 (2001) to circumstances in which Indian tribal courts attempt to exercise civil jurisdiction over state officials sued for their official conduct:

> "Our holding in this case is limited to the question of tribal court jurisdiction over State officers enforcing state law." *Nevada v. Hicks, supra*, at 2309, n.2.

Indeed, this Court reiterated the tribal court jurisdictional principles established under "the path-marking case" of *Montana v. United States*, 450 U.S. 544 (1981) again noting the higher standards previously required to allow the exercise of tribal court civil jurisdiction over non-Indians under *Montana's* Main Rule – applicable where the transaction in question occurred on non-Indian owned fee lands within an Indian Reservation boundary. *Id.* at 2309 and n.2 and 2310 and n.3. The Court also reiterated that the kind of consensual, contractual relationship necessary to invoke tribal civil jurisdiction over a non-Indian party for his conduct on non-Indian fee lands (or its equivalent)[10] under the

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[10] Even if this Court were to also require satisfaction of one of *Montana's* exceptions to sustain tribal court civil jurisdiction over a non-member private party sued by tribal members when the tribal court case arises from the non-member's conduct on reservation trust lands -- rather than on non-member owned fee lands -- that requirement would be satisfied in this case under *Montana's* consensual, commercial contract exception. *See, Hicks, supra,* at 2310, 2316 and 2318-2324 (Souter, J., concurring).

consensual relationship exception to *Montana's* Main Rule, are private commercial contracts with tribal members or a tribal entity. *Hicks*, at 2316-2317.

Thus, the Fifth Circuit's ruling is not in conflict with *Nevada v. Hicks*, *supra*, on the facts of this case.

CONCLUSION

We therefore respectfully request that the Court deny the Petition for Writ of Certiorari and the alternative summary or GVR relief sought by Bank One.

Respectfully submitted,

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APPENDIX A

FIFTH CIRCUIT RULE 47.5.4

47.5.4 Unpublished Opinions Issued on or After January 1, 1996.* Unpublished opinions issued on or after January 1, 1996*, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:

Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

APPENDIX B

42 U.S.C. § 2210(n)(2)

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable shall be filed within the period provided in section 1446 of Title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.